PETITION NOT PRINTED

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 179

THEODORE GREEN, PETITIONER

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 30, 1960
CERTIORARI GRANTED JUNE 27, 1960

Supreme Court of the United States

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No. 179

THEODORE GREEN, PETITIONER

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INDEX

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA

v.

THEODORE GREEN

MOTION FOR CORRECTION OF SENTENCE

(Rule 35 Federal Rules Criminal Procedure)

Comes now Theodore Green, and respectfully moves that the Judgment and commitment in the above entitled case be corrected to reflect that the twenty-five year term imposed under Count III, is invalid and void for the following reasons, among others, to wit:

1. When the court imposed the sentence of 20 years on Count I it exhausted its power and sentence on Count III is invalid and void.
2. The sentence on Count III is invalid and void because the jury was not properly instructed as to the law applicable to Subsection (d) of Title 18, U.S.C.A. 2113, and no verdict responsive to that subsection could be found by the jury and the Court was without power to impose a sentence under that subsection.

The defendant files herewith a memorandum in support and made part hereof.

WHEREFORE, the petitioner respectfully prays that the judgment and the commitment be corrected to reflect that that the sentence imposed under Count III is invalid and void.

(s) THEODORE GREEN
THEODORE GREEN
Box 1180,
Alcatraz, California

[fol. 2] MEMORANDUM

October 15, 1959

WYZANSKI, D. J.

October 9, 1959 the Clerk's Office received defendant's motion for correction of sentence.

The first point presented by the motion is that the sentence of 25 years imposed by Judge Ford on Count III is invalid and void because when Judge Ford imposed a 20 year sentence on Count I the Court exhausted its power.

It appears from the record that in one document Judge Ford *simultaneously* imposed upon defendant a 20 year sentence on Count I for violation of 18 U.S.C. § 2113 (a), a concurrent 20 year sentence on Count II for violation of 18 U.S.C. § 2113 (a), and a concurrent 25 year sentence on Count III for violation of 18 U.S.C. § 2113 (d). As a matter of law it may very well be that following conviction the crimes covered by Count I and Count II were merged in the crime covered by Count III, and that defendant would be entitled to have the sentences under Counts I and II set aside. *United States* v. *DiCanio*, 2nd Cir., 245 F.(2d) 713, 717. But there is no authority or reason for setting aside the sentence on the third Count. It was within the limit set by 18 U.S.C. § 2113 (d). It was a sentence which ran not[2] consecutively but concurrently with two sentences each for shorter periods of time. And the *DiCanio* case shows that it is irrelevant that the judge uttered his sentence with respect to Count I a few seconds before he uttered his sentence with respect to Count III.

The second point of the motion is that Judge Ford did not properly instruct the jury. This point cannot be raised by this motion, filed pursuant to Cr. Proc. Rule 35, [fol. 3] for correction of a sentence imposed October 27, 1952. And if it could be raised it is without merit.

Motion denied.

(s) C. E. WYZANSKI, JR.
United States District Judge

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[2] As reproduced in the appellant's "Appendix to the Brief," the word "not" was inadvertently omitted.

IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION FOR CORRECTION OF SENTENCE—
October 15, 1959

WYZANSKI, D. J.

A motion for correction of sentence having been filed on October 9, 1959 in the Clerk's Office and having been duly considered, it is

ORDERED that the motion be denied.

By the Court

(s) MIRIAM M. WYNN
Deputy Clerk

(s) C. E. WYZANSKI, JR.
United States District Judge

Order entered
October 15, 1959

[fol. 4] IN UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

TRANSCRIPT OF HEARING

Court Room No. 3, Federal Building
Boston, Massachusetts
October 22, 1952.

CHARGE TO THE JURY

The Court: Members of the jury, before we come to the indictment in this case, the charges made against this defendant, there are matters that I want to cover with you and the first matter that I want to cover is respective to these here—you, the jury and I, the Court. As you know, it is my duty to lay down certain principals of law that cover this case.

First, certain general principles of law that cover every criminal case, and then certain applicable principles of law that cover the case we are trying here today, Mr. Foreman and members of the jury.

In the first place our duties are two-fold. That is, it is for me to charge you on the law, tell you what the law is, and it is for you to decide the facts. Not only does a Court instruct a jury with respect to principles of law but in this court, in the federal court, the court is empowered to comment on the evidence, to point out the important evidence; that is, what it thinks is the important evidence, and also to give its opinion of the evidence, the facts embodied in the evidence, if it so desires, provided the Court makes it known to the jury that in the last analysis no matter what the Court says, the facts [fol. 5] are for the jury.

So you see our duties are two fold, I to lay down the principles of law and you to find the facts based on the evidence. Now, you have got to apply the law that I have given to you. If I am wrong, in error, as you know or as I tell you, whatever errors I commit may be corrected in the Court of Appeals and possibly the Supreme

[fol. 6] Court of the United States but if you think you know more law than I and you apply your own law and you commit an error, there can be no review of the error because no one will know what law you applied, so you cannot apply any versions of law you may have yourself. You must apply the law as laid down by the Court. This is all summed up in this phrase: the facts are for you, the law is for the Court.

Now, in determining the facts, where the truth lies, of course as you know you must pass upon the credibility of the witnesses. What witnesses do you believe? What part of his testimony do you believe and what part of his testimony do you reject? That is all for you, the credibility of the evidence, because that is what you have to base your verdict upon, upon the credible evidence, the evidence which you believe, the facts which you find from the evidence.

Now, there are certain guides for you. You do not have to follow these guides. I can't tell you what guides to follow or what rules to follow in passing upon the credibility of the evidence but the cases are filled with suggestions to juries as to how to pass upon the credibility of the evidence, the credibiilty of the witnesses in the case, and here are some of the considerations that I recommend to you. I don't say you must apply these but you may, as you see fit.

The appearance of the witness on the stand, the consistency of the story told, the interest, if any, contradictions, if there are any, the candor or lack of candor of the witness, his intelligence and means of information, his bias or prejudice, if any, his accuracy of recollection, the reasonableness and probability, or lack of them, of the testimony that the witness gives.

If you find that a witness has willfully falsified concerning a material fact you should disregard that false [fol. 7] testimony and you may disregard any and all testimony given by that witness. On the other hand you may disregard the false testimony and accord whatever weight you think the remainder of his testimony deserves.

The jury has a twofold obligation, as the courts have said, to assist in the enforcement of the law and protect

those unjustly accused of crime. The Government obviously wants no innocent man convicted but on the other hand it insists and has a right to insist that tryers of fact such as you are allow no guilty man to escape. It is important in a Government such as our Government that laws be enforced not only for the maintenance of Government but also for the protection of each one of us in our security and safety.

In protecting the innocent and convicting the guilty you are not to be influenced by passion, prejudice, public opinion or sympathy. You are to weigh dispassionately and consider the evidence and the law in the case and give to it your conscientious judgment. You are to decide the case on the evidence and only on the evidence you have heard in this courtroom and not from anything you heard or read before or since you became jurors in this case.

Now, the defendants in this case are charged with the robbery of a bank under aggravated circumstances, as you know now, having listened to this case. An indictment has been returned against them but I charge you the fact that an indictment has been returned against them by a Grand Jury is no evidence that they committed such a crime. The indictment is the result of an investigation made by the Grand Jury. It is a charge notifying the defendant that the Government claims they violated the law and the defendants are not to be prejudiced in any way by the fact that an indictment was returned charging them with the crime of robbery under aggravated circumstances.

A defendant at all times is presumed to be innocent [f l. 8] and such presumption remains with him from the beginning of the trial and the presumption prevails throughout the trial until overcome by evidence which satisfies you beyond a reasonable doubt in accordance with certain requirements I shall refer to in a moment that he is guilty.

The burden is upon the Government to prove the defendant or defendants are guilty beyond a reasonable doubt. The burden is on the Government throughout the trial and never shifts. The defendants are not obliged to prove themselves innocent.

I have told you each essential element of the crime must be proved beyond a reasonable doubt before there can be a conviction of either of these defendants. It is necessary to define that term and it has been defined extensively in the Supreme Court and in the other courts. Reasonable doubt is such a doubt as would affect the mind and judgment of the ordinarily reasonable and prudent man in making decisions on important matters. It is a doubt based on reason. Proof beyond a reasonable doubt has been defined correctly as not beyond a possible or imaginary doubt but such proof as precludes every reasonable hypothesis except that which it tends to support. It is proof to a moral certainty as distinguished from an absolute certainty. Proof beyond reasonable doubt does not mean that the burden is upon the Government to prove its case beyond all possible doubt. That principle was stated in this manner by one of our superior courts [reading]

> "It does not mean, however, that the Government is obliged to prove the charge beyond any and every doubt whatever—only beyond a reasonable doubt.

A mere fleeting uncertainty or whimsical doubt not substantial and not based on reason does not have to be excluded by the evidence. The term reasonable doubt means a doubt which is substantial and not merely shadowy. It does not mean a doubt born of reluctance [fol. 9] on the part of a juror to perform an unpleasant duty, or a doubt arising out of sympathy for a defendant or out of anything other than a candid consideration of all the evidence presented."

While the Government has the burden to prove every essential ingredient of the crime charged beyond a reasonable doubt and the defendant has the benefit of this rule from start to finish, the defendant is only entitled to the doubt that a rational, sensible person would hold with respect to the evidence and this rule with respect to reasonable doubt is equally applicable to both direct and circumstantial evidence, a matter that I shall refer to later in my charge.

A principle applicable to criminal cases akin to, if not a part of the rule requiring proof beyond a reasonable

doubt is that where, in the light of all the other evidence, the fact is as reasonably consistent with an inference of innocence as of guilt, that fact may not be regarded as evidence of guilt. But an act, apparently innocent when viewed by itself, may be combined with other facts found by the jury and give rise in that connection to an inference different from such as might be drawn were it to stand alone and unconnected with anything else.

Moreover, if all the facts found by the jury are fairly open to two interpretations, one innocent and the other wrongful, guilt is not established, but if all the facts found by the jury and put in their proper relations show guilt, they are then or may be regarded as undoubtedly inconsistent with innocence.

Another rule applicable to this case: the defendants, neither one, have taken the stand and testified. With respect to that Congress has passed a statute, Title 18, Section 3481 of the Code and it reads as follows [reading]

> "In the trial of all * * * persons charged with the commission of crimes—against the United States—the [fol. 10] person so charged shall at his own request be a competent witness, and his failure to make such a request shall not create any presumption against him."

What I have just said means that a defendant is not obliged to testify unless he desires to, and if he does not testify, he shall not be prejudiced thereby. The failure of the defendant to take the witness stand in his own behalf must not be considered by the jury as an element against the defendant nor be permitted by the jury in its deliberations to militate against him.

Now, a warning to you: bear in mind that no statement of mine as to the principles already laid down or of any other applicable legal principles which I shall state and have to state hereafter, is to be construed by you as an expression of the Court's opinion as to the guilt or innocence of the defendants on trial. Whether they are guilty or innocent is for you, not for me.

Also keep in mind that evidence stricken out during the trial cannot be considered by you as having any bearing

on the result. If counsel has intimated by questions which the Court has not permitted to be answered that certain things are or are not true, you must disregard such questions and refrain from any inference based upon these questions. Statements by counsel concerning the facts in the case are not evidence unless they are proved and you must look to the proof to determine what the facts are. Of course any stipulations—we have had one or two stipulations in here, calling to your mind what the stipulation is or was, there was an agreement between counsel, that is all that means. An agreement between counsel that the .32 cartridge found in the car of the witness who testified here could not be fired from the .38 calibre revolver found on one of the defendants or was testified to was found on one of the defendants.

Now, Mr. Foreman and members of the jury, with those [fol. 11] principles in mind we come to the indictment in this case. These defendants are charged with violating what is commonly known as the Bank Robbery Act; Section 2113 of the Code.

The indictment is laid in three counts. The first count charges that they entered the bank with the intent to rob it and the second count charges that they actually robbed the bank. Those are two separate offenses, entering the bank with intention to rob it and robbing it. Because of the fact at times a case might involve entering the bank with the intention to rob it and the robbery not taking place, here the Government charges that not only these defendants entered the bank in the first count with the intention of robbing it, but in the second count the Government charged they actually robbed it. I have told you that these are the bank robbery provisions of the Code.

The third count is a different type of count. That is not a separate offense. I will speak to you later of the manner in which you will handle the third count. That is not a separate offense. What the Government charges in that count, count 3, is they committed the robbery, the offense charged in count 2, in an aggravated manner. That is, they assaulted and put in jeopardy lives of certain persons by the use of a dangerous weapon. That is not a separate count, to repeat, that is an aggravation of the second count, robbing the bank.

To make it a little clearer to you, although I think I have made it eminently clear at the present time, I will read to you sections of the Code, the statutes, that are involved here. Unless an offense is set down or laid down by Congress in statute, it would be no offense against the United States. There is no common law jurisdiction of crime in the United States. I won't go into that subject but any crime—you cannot commit a crime against the United States unless Congress denominated it as a crime. [fol. 12] The first count of the indictment, I said, charges these defendants with entering the bank with the intention to rob it. I will read the section of the Code with respect to that, the pertinent parts at least. [Reading]

> "whoever enters or attempts to enter any bank * * * with intent to commit in such bank * * * any felony affecting such bank—"

and so forth and so on, would be a violation of the law.

Well, what the Government charges here is that they entered that bank, as I have already told you, for the purpose of robbing it. The robbery section of this statute.

Robbery, as you know, is taking away the property of a person against his will by force and violence and putting him in fear and that is what this section of the statute points out; robbery. Whoever, by force and violence, or by intimidation, by putting in fear, takes or attempts to take from the person or presence of another any property in his custody may be found guilty if the evidence warrants it, of the crime of robbery.

The third count with respect to the aggravated aspect of it, whoever, in committing or in an attempt to commit any of these offenses that I have already pointed out in these two sections, entering to rob and robbing, whoever committed these offenses, and assaults any person or puts in jeopardy, in danger, jeopardy means, the life of any person by the use of a dangerous weapon, and so forth, may be punished in accordance with the statute.

So to sum up at the risk of repetition, we have three counts, first, entering with the intent to rob; second, the

actual robbery of the bank; and third, committing the robbery set forth in the second count under aggravated circumstances, to wit, by the use of a dangerous weapon.

With respect to count 2 the charge is the actual robbery. You will have this indictment in the jury room and at that time you can probably follow it a little better than [fol. 13] you are following it now but it will be clear, as crystal, I believe, when you get into your Jury room where the indictment will accompany you.

With respect to count 2, the actual robbery of the bank, whether or not the Government charged that the defendant robbed the bank, took the property of the bank by putting in fear the custodians of the money.

Two persons, if a person or two persons point a pistol or pistols at a third person who has custody of the money while in close proximity to him or them, in consequence of which the property or money in his care or their care is taken away and against their will, there can be no doubt that this amounts to robbery. That is practically a repetition of what I have said already—and a violation of the statute and also, as charged in count 3, the aggravation aspect, it amounts to an assault and putting in jeopardy the life of the person by use of a dangerous weapon.

Now, that brings us down to what the issues are in this case. What are the matters that you are going to decide? Decisions based upon the evidence in that case and as counsel pointed out, they are simple, the issues are. Counsel does not mean, nor do I mean, it might be simple to reach a determination, but the issues are simple and they are these: did either one of these defendants here, Jacobanis or Green, in the first count, enter that bank for the purpose of robbing it? On count 2, did either one or both actually rob the bank? Of course where two men are charged jointly with a crime the jury might under certain circumstances, if the evidence warranted, find one guilty of the robbery and one not. In this case the Government charges that both of these defendants entered the bank, robbed it and robbed it under aggravated circumstances.

To repeat, the question with respect to count 1, which you will have before you, is, did either or both these de-

[fol. 14] fendants enter the bank for the purpose of robbing it and under count 2, did they actually rob it, either or both? Under count 3, the question is, did they rob the bank under aggravated circumstances, put in fear the life of a person by the use of a pistol?

Now, Mr. Foreman and members of the jury, you are to convict or acquit either or both of these defendants solely upon the evidence. I have said this to you a great many times. You have heard in this courtroom and, in considering, you have a right to draw reasonable inferences from the evidence, whether the evidence be a strict statement of fact or circumstances which you may have where you may not have direct proof of a fact. In this case there are many facts you have no direct proof of but you may have circumstances from which you are able to draw reasonable conclusions and deductions.

As counsel for the defendant have pointed out, there is a great mass of circumstantial evidence in this case but you remember I told you that the rules with respect to reasonable doubt apply to circumstantial evidence as well as direct evidence and I have already told you in the charge that I have just given to you immediately before I came to this aspect of the charge, that you can convict a defendant on circumstantial evidence as well as direct evidence if you find that the circumstantial evidence warrants a finding that the crime was committed beyond a reasonable doubt.

To explain to you the difference between direct and circumstantial evidence, direct evidence is what we see, what we hear or what we smell or what we taste; an application of the senses. That is direct evidence. I see the foreman of the jury before me now; that is direct evidence. If he stood up and spoke to me, that would be direct evidence; I would hear him.

Circumstantial evidence, counsel have argued and talked [fol. 15] about, circumstantial evidence, and there is considerable circumstantial evidence in this case—in fact most of the facts have been proved by circumstantial evidence—but I charge you that if you find on circumstantial evidence that these defendants are guilty beyond a reasonable doubt, you would be warranted to do so.

Circumstantial evidence is that evidence which tends to prove a fact by proof of other facts which have a legitimate tendency to lead the mind to a conclusion that the fact is so which it has sought to establish. You remember the old Robinson Crusoe story, and somebody found, Crusoe himself—I am getting old and I don't remember—didn't he find a human footprint in the sand? Of course that was circumstantial evidence to prove there was a human being on that island. He didn't see the human being but he found facts and circumstances from which he could deduce there was a human being on the island. That is a good and classic example of circumstantial evidence. Such circumstantial evidence is entirely proper and legal and can be made the basis of your verdict.

This kind of evidence, however, to warrant a conviction must be of such a character as to exclude every reasonable hypothesis but that of guilt of the offense charged to have been committed by a defendant or defendants, or in other words, the facts must be entirely consistent with and point to his or their guilt only and must be inconsistent with his or their innocence.

If the evidence, upon any essential element of the case or upon the whole case, is as consistent with the innocence of any defendant as with his guilt, it is insufficient to warrant a conviction of such defendants.

Counsel have argued extensively with respect to Roccaforte and the fact he is an accomplice and also argued at length the fact that he pleaded guilty and what effect that should have on the jury and I must direct your attention [fol. 16] to these aspects of the case at the present time. During the course of trial Roccaforte, who undoubtedly on his evidence, if you believe it, was an accomplice, pleaded guilty. Roccaforte's confession of guilt inherent in his plea of guilty constitutes no evidence of guilt of either one of these defendants. The guilt or innocence of the defendants is to be determined on the evidence submitted at the trial and all reasonable inferences to be drawn from it.

However, even though Roccaforte's plea of guilty is no evidence of the defendants' guilt, it does not mean you may disregard his testimony. You must consider his testi-

mony and give it whatever weight you wish. Roccaforte, from his testimony, as I have said before, is and may be referred to and has been by counsel as an accomplice. The rule is that the testimony of an accomplice should be scrutinized with care and any promise, expressed or implied, from the circumstances, made to him and any indebtedness of his to the Government should be taken into consideration in weighing his testimony.

It is not the law, however, that you are obliged to reject the testimony of Roccaforte because he is an accomplice. His testimony is entitled to such weight as you decide to give it in view of all the circumstances of the case.

There is no rule of law to the effect that in order to be believed the testimony of an accomplice must be corroborated but it is important in weighing the testimony and credibility of such a witness to look to other circumstances proven in the case which may furnish corroboration of his testimony. In other words, to sum that up, it does not have to be corroborated. You can convict if you believe it on his testimony alone but it is well to be careful with respect to the manner of carrying out this instruction of the Court to view it carefully, to look around for some corroboration.

The evidence in this case, as I have said, was generally circumstantial evidence and I have charged you you can [fol. 17] convict if you can believe it, of all the elements of the crime, beyond a reasonable doubt, on circumstantial evidence but I want to point out to you there was some direct evidence in the case and the direct evidence was adduced in this trial by the witness Bistany.

He testified at the Hotel Arnold in Murray's car, as I remember it, another person who was associated with these—as he testified down at Pawtucket that both of these defendants admitted that they committed this robbery of the Norwood Bank. That would be direct testimony of the commission of the crime by these defendants and if you believed him, if you believe that evidence adduced by Bistany upon the stand, which is direct evidence, you will be warranted in the event you did believe it, Mr. Foreman and members of the jury, in finding these defendants guilty.

Now, there are some things in this case I must point out to you, that there is no controversy at all about, and counsel pointed that out to you, counsel for defendants and counsel for Government point out to you. The defendants' counsel do not dispute that a robbery of the Norwood Bank was committed. There is no question on this evidence that a finding that a robbery was committed could be found, and they don't deny that.

What they do deny, that either or both of these defendants, Mr. Juggins for Jacobanis said he was not concerned with the crime, and Mr. Callahan for defendant Green contends that is their position. They say that the defendants they respectively represent were not concerned in the crime but they do agree that the bank was robbed.

And then there is no contention in respect to the third count of the indictment, that whoever robbed that bank put in jeopardy the lives and the persons who had custody of that money by the use of a dangerous weapon. The evidence in the case pointed to that and counsel for [fol. 18] the defense do not dispute that fact so we have those facts to put to one side.

As I said earlier in my charge the simple question may be difficult to reach or it may be easy to reach. I take no position on that but the question is whether or not either one of these defendants robbed the bank.

There is another burden upon the Government here to prove with respect to their case, that this bank was insured in the Federal Deposit Insurance Corporation. This was a state bank. This court would have no jurisdiction of a robbery of a state bank ordnarily but it has jurisdiction of a robbery of a state bank when the bank is insured in the Federal Deposit Insurance Corporation. That insures the funds in a state bank and that is so, the fact that we have jurisdiction of the robbery of a state bank when it is insured in the Federal Deposit Insurance Corporation, by virtue of a section of the statute, 2113, Section (f) of the Code. [Reading]

> "As used in this section the term "bank" means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institutions organized or oper-

ating under the laws of the United States, and any bank the deposits of which are insured by the Federal Deposit Insurance Corporation."

The burden was on the Government to prove beyond a reasonable doubt, that being one of the elements of this crime, that the deposits of the Norwood Bank were insured in the Federal Deposit Insurance Corporation. Counsel didn't argue that point because the evidence here was abundant to show that it was a bank, in the first instance, and, in the second instance, it was a state bank and there was documentary evidence to show here it was insured in the Federal Deposit Insurance Corporation. There was no denial of that evidence so on that evidence, [fol. 19] if you believed it, you would be warranted in finding this bank was insured in the Federal Deposit Insurance Corporation.

Now, with respect to the evidence in the case where there is the controversy, it seems the controversy revolved about the credibility of the evidence presented here and the credibility of Roccaforte, who presented his evidence here with which you are familiar and it was argued at some length and at great length by all the counsel in this case, both for the defense and for the Government and I don't know, Mr. Foreman and members of the jury, without making this charge unduly long, that I should go over that evidence. It is fresh in your mind. You heard Roccaforte here testify how he met Jacobanis out in Norwood, just to go over some parts of it, and how they were at Norwood. That is what he testified to, and then how he and Green stole that car out there in the Back Bay and the incident of the police officers and then you heard the other evidence of the ownership of this blue automobile that was stolen from that lot out there were Roccaforte says he stole a blue car with the number testified to here by the owner and the testimony of the occupant of the pharmacy with respect to the number of the car that was concerned in the robbery.

Now, Roccaforte did not see the crime committed. Consequently that is what is referred to as circumstantial evidence. If you believe it, you can convict and there is compliance with the rules I have laid down with respect

to reasonable doubt on circumstantial evidence, with respect to direct evidence. I have already pointed out to you the direct evidence of Bistany that both of these defendants admitted they committed that robbery. Then you have heard all the other evidence about— I don't think I need to review it at all because it was admitted the robbery was committed and that goes over five or six or seven or eight or nine witnesses, I think, that were [fol. 20] presented to show the robbery was committed. And then Roccaforte came to testify and then Bistany came to testify.

And the Government, as you know, it is obvious, places chief reliance to prove that these defendants are guilty on the evidence of these men so that the credibility, in accordance with the rules that I said you may apply, is the important matter in this case. Do you believe these witnesses or do you not? That is the question for you to decide.

Finally, members of the jury, in considering the evidence here in the case if you find the Government has not satisfied you or persuaded you beyond a reasonable doubt that these defendants robbed the Norwood Bank, you should acquit. If, on the other hand, you were satisfied that the Government proved every element of the offense beyond a reasonable doubt with respect to either or both and they committed the offenses as charged, you will find them guilty.

In order to find either defendant guilty a verdict must be unanimous, Mr. Foreman and members of the jury, and represent the decision of each individual juror.

The object of the jury system is to create a unanimous verdict of guilt or innocence in a criminal case through the exchange of views, reasons and arguments among the several jurors. Although the verdict should represent the considered judgment of each person, a juror should not refuse to listen to the arguments of other jurors, equally intelligent and equally earnest in the effort to mete out justice.

When you return to this court you will be asked to return an oral verdict. There are no written verdicts in criminal cases, as distinguished from civil cases, which you will be familiar with when we come to try some civil

cases, but in a criminal case the verdict is returned orally and when you return to this court after your deliberations [fol. 21] the Clerk of the court will ask you whether or not you have reached a verdict on each count of the indictment, count 1, count 2 and count 3.

As I have said to you earlier in the charge, you will deliberate and return a verdict on each count. Count 1, is either or both defendants guilty or not guilty; count 2, the same; count 3, the same. And you will have the indictment and the exhibits with you in the jury room to aid you in your deliberations.

Now, members of the jury, if you will bear with me one minute I will talk to counsel and listen to whatever they wish to say with respect to any matters I omitted or with respect to those matters I have been in error about in my charge.

[Conference at the bench:

Mr. Callahan: If your Honor please, I direct your attention to request No. 9.

The Court: No, I won't give that. I refuse that. Objection noted.

Mr. Callahan: I direct your Honor's attention to request No. 12.

The Court: I won't give it in that form. I think I have covered it in another manner. Objection noted.

Mr. Callahan: I suggest your Honor hasn't said anything about bias and prejudice of a witness.

The Court: I did talk about any favor or whatnot in talking about accomplices.

Mr. Callahan: We don't—

The Court: I don't think you are right when you say that. In passing on the credibility I read to them, if you will bear with me a minute—the candor and intelligence and bias or prejudice, if any. I know I said that because I read it from the Chandler case.

Mr. Callahan: I would ask your Honor to give [fol. 22] the balance of the request, to say that if they determine that a witness is testifying through bias or prejudice, that they—and they are satisfied he has

not testified truly in the case, that they may disregard his testimony altogether.

The Court: I have said that a great many times. I told them they could disregard any testimony that was false. Willfully falsify a material fact, you should disregard that false testimony and disregard any and all testimony given by that witness. Whether it is caused by bias or prejudice or whatnot, I don't think is important. If it is false is the important thing. Whether it is from bias or prejudice or no bias or prejudice, he is a plain, downright liar. I think I have covered that amply.

Mr. Callahan: I might suggest No. 12 is a quotation from Pinkerton versus United States, 145 Fed. 2nd.

The Court: I don't disagree with it but I don't give it in that form. If he hasn't testified truly, of course they should kick him out and find the defendants not guilty. After all that connotes they find his testimony false. Certainly I left the impression they should not find them guilty on false testimony.

Mr. Callahan: But if they find he is biased and prejudiced, that is the reason for his testimony—

The Court: I won't give it in that form. I think I have covered that amply.

Mr. Callahan: All right, then, we would have an objection.

The Court: Oh, sure, for not giving it in that form. I don't have to give them in the form you suggest. Certainly I don't have to quote from these, unless I want to.

Mr. Callahan: No. 14

[fol. 23] The Court: I told them to take into consideration the fact as to whether any promises were given, and so forth, for his testimony.

Mr. Callahan: Would your Honor let us have an objection for your refusal to give 14?

The Court: I can't prevent you from having an objection. Certainly you can have an objection.

Mr. Callahan: 16.

The Court: I thought I did very well for you in

that charge. I went a little further than I thought I would yesterday on that.

Mr. Callahan: I would suggest to your Honor that the corroborative evidence ought to be corroboration of some fact that connects the defendant with the crime, not some immaterial matter. Just as I argued to the jury.

The Court: I don't think I want to change it. I think I was very fair in what I said about that. I said in scrutinizing the testimony of the accomplice to look around for some corroboration. I thought that was fair to you.

Mr. Callahan: What I have in mind, Judge, is the explanation of what corroborative evidence is.

The Court: Everybody knows what that means. It is a common term. Supporting evidence. To back him up.

Mr. Callahan: But in a criminal case it has to be supporting evidence of some material that connects the defendant with the crime.

The Court: I haven't any doubt about that. I didn't think the jury would regard it they would have to connect somebody else with the crime.

Mr. Callahan: I will take an objection.

The Court: Sure. In fact I am afraid the Court of Appeals will say I went too far.

[fol. 24] Mr. Callahan: Now 17.

The Court: I didn't refer to that. I won't give it.

Mr. Callahan: All right; objection and exception.

The Court: That was taken out of a case where somebody wrote an opinion. During the trial I did instruct them with regard to statements made after arrest. Maybe that doesn't hit that on the nose but I won't change it.

Mr. Callahan: 18, if your Honor please, I think we are entitled to that in view of the argument of the District Attorney.

The Court: I have said so. I referred to the zeal and so forth and so on.

Mr. Callahan: Yes, but the District Attorney in his argument to the jury stated that there was no evi-

dence that connected that gun in any way with the robbery.

The Court: I don't think—.

Mr. Callahan: No, and I think we are entitled to have that stated to the jury. Particularly in view of the admission of the District Attorney in his argument.

The Court: I didn't think there was any contention made by the Government that that gun was connected.

Mr. Jones: My memory of it was Mr. Hassan said we didn't claim that gun was used in the robbery.

The Court: I think so.

Mr. Callahan: Then we are entitled to an instruction that there is no evidence.

The Court: No. If he admitted it and the jury had it before them, that's that. I don't, in my charge, have to reargue the case for the defendant.

Mr. Callahan: Now, the last is 19, Judge? I think we are entitled to that,

[fol. 25] The Court: No, I won't give 19. I will leave it in the form I gave it and I thought I was very charitable to him.

Mr. Callahan: Objection.

The Court: Absolutely.

Mr. Callahan: Again, Judge, not being too familiar, I don't understand you say "objection and exception"; you just say "objection".

The Court: You say either one and you will be perfectly safe. Didn't I tell you if you got to the Court of Appeals, your record shows your exception. For instance, you failed to point out I didn't give one of these and later on you wanted to bring it to the Court, I would be the last judge in the United States to say you couldn't bring it because you didn't bring it in a timely fashion.

Mr. Callahan: I was under the impression you have to get these things on the record.

The Court: That's right. I have no criticism of you at all. But I say if there was an omission I think it should get on the record anyway. We are here to do justice, not to trick people.

Mr. Juggins: Are you finished?

Mr. Callahan: Yes.

Mr. Juggins: The only thing I have in mind was that No. 9.

The Court: That has been bothering us since the beginning of the trial.

Mr. Juggins: That is the one we originally raised a question on.

The Court: I won't change it. There are two separate offenses charged without any question of doubt.

Mr. Juggins: Well, your Honor—I suppose I have to save my rights. That was all I had—

[fol. 26] The Court: Jacobanis objects to the failure of the Court to give instruction No. 9. They follow the same order?

Mr. Juggins: I am quite certain.

The Court: If it doesn't, we will take care of it. Is that all?

Mr. Juggins: Most of the other requests which Mr. Callahan has been talking about have reference to Green and Jacobanis. It occurred to me Mr. Callahan had offered records of both Roccaforte and Bistany. I assume that those records might have reference to their credibility which might be another element in the picture.

The Court: Records? Didn't I instruct them when the records went in to consider those in affecting their credibility?

Mr. Juggins: You did that, yes.

The Court: I will leave it there. That's all they went in for.

Mr. Juggins: If your Honor thinks that covers it.

The Court: I think it does. I think so.

Mr. Juggins: That was the only thing I had.

The Court: I remember I did that.

Mr. Juggins: Yes, I know you did.

The Court: I don't think I will do that again.

Mr. Juggins: I don't want them to forget that.

The Court: I don't want to emphasize the point.

Mr. Juggins: Of course we would like you to.

The Court: All right. Are we through, gentlemen? Have you exhausted your requests to me now?

Mr. Callahan: I have.

The Court: Let me discharge the alternate jurors.]

The Court: Now, the original jury that has been chosen, not the two alternates,—the two alternates will [fol. 27] remain in the courtroom but the first twelve men drawn will retire to consider the verdict.

[The jury retires]

The Court: You being alternate jurors, you are now discharged from further consideration of this case. You are discharged, and report here next Tuesday morning at ten o'clock. We will excuse you from the civil cases coming on the rest of the week because I think you have sat here very patiently during this case. Come in next Tuesday morning at ten o'clock. Thank you for your kind attention.

[The jury returned a verdict of guilty on all counts, each defendants]

The Court: Gentlemen of the jury, you may be excused now until next Thursday morning at ten o'clock when you will report here. We won't require you to sit on any further cases this week. Do we all understand, gentlemen? Tuesday morning.

Mr. Hassan: May it please the Court, the Government at this time moves for sentence of these two defendants.

The Court: Is the probation officer here?

The Probation Officer: Yes, your Honor. The reports aren't complete. We haven't received a narrative from the United States Attorney's Office.

The Court: Are your investigations complete?

The Probation Officer: Yes, they are.

The Court: Do you want to give them to me?

[Reports are handed to the Court]

The Court: Do the defense counsel want to be heard with respect to any matter at this point?

Mr. Callahan: Judge, so far as the defendant Green is concerned, we are ready for the disposition but I would like to address your Honor on it.

The Court: Yes, I know. Your attitude probably would be the same, Mr. Juggins?

[fol. 28] Mr. Juggins: Yes, your Honor.

The Court: I am not quite prepared to sentence the defendants at this moment. The probation reports have just been presented to me. I want to read and study those and I want to give some consideration to the matters of law involved with respect to the counts on which the defendants are found guilty and I will postpone the matter of sentence. I am going to postpone sentence until Monday morning at eleven o'clock. I want to give the matter some thought.

Mr. Hassan: In view of the conviction as to defendant Jacobanis I would recommend to your Honor bail be set in the amount of $50,000. It is now $25,000. With surety.

Mr. Juggins; I still understand the original indictment is still pending. On that he was being held for $25,000 and $25,000 on this one and that makes a total of $50,000 he is held on the present moment. The original indictment not having been dismissed.

The Court: Is he held in $25,000 on both of these indictments, Mr. Clerk?

The Clerk: On this one it is $25,000.

The Court: Twenty-five on the other?

Mr. Hassan: It is not my memory at the minute. I don't have my file here, unfortunately. It was my impression the defendant Jacobanis was held in the amount of $25,000 on both indictments. In other words, we did not set new bail on this. The other, Green, was $50,000.

The Court: Let's not leave this to chance. Let us find out.

[A brief pause]

Mr. Hassan: Jacobanis is only in on this case, if your Honor please; he is not a defendant in the other case and I am certain it is $25,000. Jacobanis was only indicted on the Norwood Bank robbery. Sorry I forgot that for the moment.

[fol. 29] The Court: Where is Jacobanis now?

Mr. Hassan: I believe he is at Charles Street Jail and in default of bail, of $25,000 bail.

The Court: With respect to Green, he is confined, is he?

Mr. Hassan: He is confined at State Prison, yes, your Honor.

The Court: So that his bail will remain the same. Is he under twenty-five?

Mr. Hassan: $25,000 in this case and $25,000 in the other case, a total of $50,000.

The Clerk: Theodore Green and David S. Jacobanis, the Court orders you both committed without bail pending sentence.

The Court: Sentence next Monday at eleven o'clock.

Mr. Hassan: If you will be good enough to wait for a moment, I have a motion for dismissal of the other indictment, if you want to take it up at this time.

The Court: There is no hurry about that. We can do it Monday just as well as today.

[Adjourned]

[fol. 30] IN UNITED STATES
COURT OF APPEALS FOR THE
FIRST CIRCUIT

No. 5593

THEODORE GREEN, PETITIONER, APPELLANT

v.

UNITED STATES OF AMERICA, RESPONDENT, APPELLEE

Appeal from the United States District Court
for the District of Massachusetts.

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*

Theodore Green, pro se, on brief for appellant.

Elliot L. Richardson, United States Attorney, and *William J. Koen*, Assistant U. S. Attorney, on brief for appellee.

OPINION OF THE COURT—January 20, 1960

PER CURIAM. Petitioner, Theodore Green, was found guilty by a jury in the district court for the District of Massachusetts on a three-count indictment charging, (1) entry into a bank with intent to commit a felony and (2) robbery, both in violation of 18 U.S.C. § 2113(a), and (3) armed robbery, in violation of 18 U.S.C. § 2113(d). On October 27, 1952, he was sentenced to 20 years on Count 1, 20 years on Count 2, and 25 years on Count 3, being the maximum on each count, to be served concurrently. He failed to prosecute his appeal. Starting with this commonplace script petitioner has woven an extensive serial story, the last episode of which was before this court a [fol. 31] month ago in *Green* v. *United States*, 1 Cir., 1959, F.2d . The present installment, a motion under Rule 35, Federal Rules of Criminal Procedure, 18 U.S.C., introduces a new element, and seeks to revive one long departed. Taking this last first, it is that the sentence on Count 3 was "invalid and void" because of error

in the charge. This contention cannot be converted into a Rule 35 matter by the semantic device of alleging that "because of the erroneous instructions no verdict responsive to the allegation of the third count of the indictment was found and hence the sentence of the Court was invalid." Rule 35 is for the correction of illegal sentences, "those that the judgment of conviction did not authorize," *United States v. Morgan*, 1954, 346 U.S. 502, 506, not for the correction of improper convictions. "A motion for correction of sentence under Rule 35 presupposes a valid conviction and affords a procedure for bringing an improper sentence into conformity with the law." *Cook* v. *United States*, 1 Cir., 1948, 171 F.2d 567, 570, *cert. den.*, 1949, 336 U.S. 926. Any errors committed in the charge, or for that matter, any question of the sufficiency of the evidence, were reviewable on appeal.

Petitioner's other point has some semblance of merit, but he attempts to draw from it more than he is entitled to. Petitioner correctly points out that sentencing him on the three counts was, as we stated in *Campbell* v. *United States*, 1 Cir., 1959, 269 F.2d 688, 692, "technically incorrect." With regard to the relationship of Count 1, charging entry with intent to commit a felony, to Count 2, charging robbery, the matter is determined by *Prince* v. *United States*, 1957, 352 U.S. 322. While the actual issue decided in that case was the narrower one of "whether unlawful entry and robbery are two offenses *consecutively punishable* . . ," (emphasis supplied), the court also refers to the broader question of "whether the crime of entering a bank with intent to commit a robbery is merged with [fol. 32] the crime of robbery when the latter is consummated . . ." 352 U.S. at 324. The inference to be drawn from the decision is that it is. Similarly, *Holiday* v. *Johnson*, 1941, 313 U.S. 342, 349, suggests, and there is ample other authority for the proposition, that the offense of robbery, and the offense of aggravated robbery under section 2113(d) are not separate crimes to the extent that consecutive sentences can be imposed on separate counts. See Annotation, 1958, 59 A.L.R. 2d 946, 965-70, 992-94. Strictly, consecutive or otherwise, we hold that petitioner should have received only a single sentence. But we do not agree with him that by the imposition of the 20-year

sentence on Count 1 the court "exhausted its power" to go any further. Many cases have discussed the general problem of an erroneous number of sentences, applying various theories, but, it has been pointed out, "in every instance the sentence on the count which carried with it the greater penalty was held valid." 59 A.L.R.2d, *supra*, at 996. We concur in that result.

The remaining issue, then, is whether petitioner should receive the paper satisfaction, for which relief he has not in fact asked, of having the sentences under Counts 1 and 2 vacated, leaving him only with the single sentence under Count 3. In *Campbell, supra,* we indicated that this was merely a technical matter because the sentences were concurrent, and we refused to vacate the incorrect sentences on the ground that "the defendants are not harmed." 269 F.2d at 692. Had the sentences related to different transactions, at different times, petitioner's opportunity for parole might be affected. See *Hibdon* v. *United States*, 6 Cir., 1953, 204 F.2d 834, 839; *cf. Audett* v. *United States*, 9 Cir., 1959, 265 F.2d 837, 848, *cert. den.*, 361 U.S. 815. Here we do not see even that danger.

Judgment will enter affirming the order of the District Court denying the motion.

[fol. 33] IN UNITED STATES
COURT OF APPEALS FOR THE
FIRST CIRCUIT

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JUDGMENT—January 20, 1960

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was submitted on briefs and record appendices,*

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The order of the District Court is affirmed.

By the Court:

ROGER A. STINCHFIELD, Clerk.

By /s/ DANA H. GALLUP
Chief Deputy Clerk

Approved:

/s/ PETER WOODBURY
Chief Judge.

• • • •

[fol. 34] Clerk's Certificate to foregoing transcript omitted in printing

[fol. 35] SUPREME COURT OF THE UNITED STATES

No. 712 Misc., October Term, 1959

THEODORE GREEN, PETITIONER

vs.

UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the First Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—June 27, 1960

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1039 and consolidated for argument with No. 870. A total of two hours is allowed for the argument of these cases.

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